No. 87-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL H. AND VICTORIA D.,
Appellants,

v.

GERALD D.,
Appellee.

On Appeal From
Court of Appeal of California
Second Appellate District

REPLY BRIEF FOR APPELLANT VICTORIA D.

LESLIE ELLEN SHEAR
SHEAR AND KUSHNER
15915 Ventura Boulevard
Penthouse Suite Four
Encino, CA 91436
(818) 501-3691
Attorney and Guardian ad Litem for Appellant Victoria D., A Minor.

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

This appeal presents the Supreme Court for the first time with a case involving doctrines arisisng out of the concept of illegitimacy in a state which has adopted the Uniform Parentage Act. Victoria asserts that having enacted the Uniform Parentage Act, which relies substantially on biological paternity and specifically makes parental marital status irrelevant, California has deprived her of substantive due process, procedural due process, and equal protection by retaining a conclusive presumption which determined her paternity on the sole basis of her mother's marital status. The presumption that a woman's husband is the father of her child is an anachronistic remnant of a repealed statutory scheme, which in turn, is derived from the common law. In a society where divorce and nonmarital sexual relationships were rare, where wives assumed primary responsibility for child-rearing and husbands assumed primary responsibility for economic support, most children may have been reared in a household consisting of a husband, wife and their biological children. A State could properly conclude that the well-being of children born to married women as a result of extramarital sexual conduct was best preserved by perpetuation of the fiction that the husband had fathered the child. Otherwise the child might find itself without economic support, and socially rejected by the community. But "[t]he traditional nuclear family with the husband working to support his dependent wife and children had become an exception rather than the rule and is now typical of fewer than 10 percent of all households." Family Service America, *The State of Families: 1984-1985*, pp. 7-15, 23, 32, 60, 72-77.

Victoria is deprived of substantive due process in that the statute ignores her fundamental protected interest in

the preservation or restoration of her established relationship with Michael H.

Victoria is deprived of procedural due process[1] in that

[1] "Due process means procedure that is either fair on not fair in a particular context. The factual situation again determines the outcome. Proper application of both constitutional standards depend, therefore, on a realistic understanding of social facts rather than a picture of society that is biased and distorted by being viewed through outmoded stereotypes. Although the Supreme Court knows that its duty is to decide cases on the basis of constitutional principles rather than social science data, its assessments of constitutional fairness and equality will be invalid if they are not based on some degree of understanding of social facts. This does not mean that a court must undertake an independent inquiry in order to understand the underlying substance of a dispute. Most cases dealing with social issues now present some documentation in the briefs.

"Just as *Brown* illustrates the relationship between constitutional doctrine and shifting social facts, so also it illustrates one of the important roles of the Supreme Court—that of a facilitator of social change. Popular institutions, charged with the task of keeping the law in tune with new conditions, are sometimes immobilized, checked, balanced, fragmented, and efforts to introduce new social policies become stalled in wars between opposing forces stagnating behind permanent Maginot lines. The Supreme Court, as self-appointed guardian of the Constitution, has some responsibility in its own right for keeping legal rules in harmony with fundamental principles. In many of the great conflicts of the past, it has accepted the obligation and changed the law to bring it into line with new obligation and changed the law to bring it into line with new circumstances and perceptions. In these crucial cases, "pivotal cases" like *Brown*, it is possible to see the Court acting not as a maker of law, but as a remover of obstacles to the proper functioning of the political process. Reaching back to invigorating constitutional principles, the Court breaks a stalemate, cuts the Gordian knot and frees a new alignment of political forces to work out a new political solution. The initial problem is not necessarily "solved," but the terms of the conflict are redefined and the battle is resumed on different grounds. E. Rubin, "Introduction" *The Supreme Court and the American Family* (1986) at pp. 4-5.

the statute conclusively presumes that her best interests are met by conferring the rights, responsibilities and status of fatherhood on her mother's husband, regardless of the surrounding individual and societal facts and circumstances. Moreover, adjudication of such significant results in summary judgment proceedings, without permitting adequate discovery, made it difficult for the court to properly balance the competing interests and determine whether the statute could properly be invoked to preclude a continued family relationship between Michael and Victoria.

Victoria is deprived of equal protection, because although the Uniform Parentage Act establishes that parental marital status has no impact on the child's status, she belongs to a class of children whose relationships are still established solely with reference to maternal marital status. The statutory scheme has an inherent gender bias, presuming that a focus on maternal marital status best protects child welfare. This is based in turn, upon the inaccurate assumption that the principal role of mothers is child-rearing and the principal role of fathers is economic support. Thus paternal marital status is never relevant, but maternal marital status is critical to insure that mother and child are not economically abandoned by mother's husband. Although the professed rationale is protection of marital families, only maternal marital families are so protected. The problem is that these social assumptions no longer accurately reflect contemporary American society.[2] Moreover, by defining Michael H. as a

[2] ". . . [I]ndividual judicial decisions still reveal a great reluctance to examine traditional stereotypes about the family, even as social and economic pressures are causing monumental changes in the family itself. The law, precedents and statutes, assumes a familiar family pattern, as well as settled traditional male and female roles.

nonparent, California has denied Victoria the "frequent and continuing contact" with him that California Civil Code Section 4600 promises all children whose parents have separated, unless such contact would be detrimental to the child. Maintenance of a special classification for children based upon maternal marital status cannot withstand the "intermediate scrutiny" afforded classifications based upon legitimacy under equal protection doctrine.

Further, since Victoria's rights to relationships are intertwined with those of her parental figures, she was deprived of equal protection to the extent that Evidence Code Section 621 treated Michael H. differently than other parents who are not married to the person with whom they conceive and bear children.

This reply brief responds to the contentions of Appellee's Brief on the Merits, and the impact of recent decisions of the U.S. Supreme Court and the California Court of Appeal.

RESPONSE TO APPELLEE'S CONTENTIONS

Appellants and Amicae ask the Court to consider the definitions of "parent," "non-parent," "father," and "family" in the context of constitutional protection. Appellee's

---

Judges and justices are deeply attracted to the familiar pattern. Their own family experiences and training have created deep psychological commitments to certain family forms. In addition to personal and political convictions about what family life should be, their institutional obligation to apply time-honored principles colors their judgments even when these views conflict with new social facts. *It is clear from facts and figures now being collected about American families that very few families actually conform to the preferred model, a model that is perhaps largely mythological.*" E. Rubin, "Introduction" *The Supreme Court and the American Family* (1986) at pp. 3-4. [Emphasis added.]

brief ignores that core question and engages in semantic manipulation in support of a particular narrow family ideology. For example, Appellee uses the term "family" to refer only to a husband, wife and their child, ignoring the other types of familial relationships.[3] Similarly, Appellee argues that "the question presented in this appeal does not include the question whether the Constitution requires state laws to allow visitation to a non-parent over

---

[3] In *The Supreme Court and the American Family* (1986), Eva Rubin reviews Supreme Court decisions regarding family issues in an effort to identify the "ideology of the family" which underlies the opinions. Rubin writes:

> Although family-related cases on the Court's docket present legal and constitutional problems, they also provide a sampling of the social problems generated by major changes taking place in the structure of American life in a time of "cultural disintegration and social transformation." If, as Arthur S. Miller has remarked, "Law is only a memorandum," legal rules incorporate the formulas for handling conflicts that society accepts at any given time. In order to provide a basis for handling conflicts effectively, however, the solutions that the law offers must be relevant to society's real problems and give answers in line with contemporary expectations. When the older, traditional solutions contained in the law are no longer acceptable to society at large, legislatures and courts must change or reinterpret the legal rules. There has been very rapid change in family life and in standards of personal behavior in the last forty years, but as yet no consensus has been reached as to what is happening, where we are going or what we are ready to accept as the norm. The traditional rules covering many social relationships no longer reflect settled patterns of behavior, and, as one might expect, conflicts between what the law posits and the way people actually behave frequently end up in the courts.
>
> "State law has always regulated the basic patterns of marriage, divorce, sex, morality and even some aspects of child-rearing and living arrangements, although there has also been an unspoken agreement that the state should leave some things to private negotiation and not intrude too deeply behind the domestic curtain. The old rules favor the family as a social and economic unit. But the basic fact is that the role of the family in American society today is in flux." E. Rubin, "The Ideology of the Family" *supra.*, at p. 12.

the parents' objections." (A.B. at p. 14, note 7). Rather the issue is whether the relationship between Victoria and Michael H. bears enough of the characteristics of a parent and child relationship to entitle it to legal recognition and protection either by establishment of the legal status of parenthood, or by continuation of visitation.

Appellee argues that Evidence Code Section 621 does not discriminate against unwed biological fathers because it treats their rights identically to the rights of the mother.[4] However, while the husband is given two years after the child's birth to challenge paternity, the biological father's rights are conditioned upon either denial of paternity by the biological father or the cooperation of the mother. By contrast, the rights of the husband are not conditioned upon any conduct of another person. He may act unilaterally. No matter what psychological attachments the child has formed, he or she is given no statutory right to establish a legal relationship with a biological and psychological parent.

Appellee characterizes the issue presented as "the constitutional adequacy of California's procedures for establishing paternity insofar as they favor the family when those principles collide." (A.B. at p. 12) This characterization misses the underlying and more significant question: which familial relationships are entitled to constitutional protection?[5] California's statute favors a particular family

[4] Appellee's Brief on the Merits (hereafter referred to as A.B.) at p. 11.

[5] "Although few cases raising questions about the legal and constitutional status of variant family forms have been decided at the Supreme Court level, state courts have been struggling with legal problems raised by the increasing experimentation with alternate life styles. The family is nothing, if not adaptable. There is a rich profu-

constellation at the expense of other significant family relationships.

Gerald D. misses the underlying definitional questions when he argues that

> Appellants are unable to articulate their position fully because their arguments rest upon a fundamental misconception of the issues adjudicated and interests implicated in this proceeding. This was an action to determine *parentage;* Appellants' requests for orders allowing Michael *visitation* with Victoria were predicated upon their claims that Michael was en-

sion of family configurations and novel relationships on the contemporary social scene: persons not married but living together, with or without children, people living together for convenience and companionship, foster homes, communes, group homes, homosexual or lesbian "marriages." Relationships between children and their parents are no longer based simply on biological ties; divorce and remarriage have produced complicated constellations of step-parents, step-children and half-brothers and sisters. New kinds of legal problems have been raised by artificial insemination, surrogate mothers and test-tube babies. Most of these new family relationships have some but not all of the characteristics of traditional families, or fulfill some but not all family functions.

"An attempt to list the social needs that families fulfill would probably include the following: provision of secure relationships for sexual activity and procreation, provision of an environment suitable for child-rearing, creation of small, self-sufficient economic units, supplying of psychological and emotional support, and provision of care in sickness and old age. Many of the alternate family forms perform more than one of these functions, yet the law has been slow to characterize them as families. People living in these relationships are beginning to ask for the status, privileges and protections that the law affords more traditional families. There is a plausible argument for accepting, regularizing and extending legal protection to many of these family configurations in order to promote stability and to allow state regulation." E. Rubin "What is a Family?" *The Supreme Court and the American Family* (1986)

titled to recognition as Victoria's father."
(A.B. at p. 14)

Evidence Code Section 621 defines the mother's husband as the child's father, disregarding biological and psychological paternity. Yet, if the mother is unmarried, biology alone, is orginarily the basis for establishment of paternity, and its ensuing rights, responsibilities, and emotional and cultural ramifications. Among the rights of parenthood is the right to a continued relationship with the child. Among the responsibilities of parenthood is the obligation to provide economic support for the child. Thus appellants do not confuse the questions of paternity and visitation. Establishment of paternity is the statutory key to standing to preserve the relationship. This is particularly true in view of the holding that Evidence Code Section 621 also precluded Victoria's complaint to establish custody-visitation rights with Michael on the basis of their psychological or de facto parent and child relationship under Civil Code Section 4601.

Victoria (through her guardian ad litem) has never sought to "establish that a child has a constitutional right to select between two competing claimants the one entitled to recognition as her father." Rather, *she has sought to preserve her relationship with each*. Those relationships arose because of the actions and inactions of Carole, Michael and Gerald. Having established a pyschological relationship with her biological father, Victoria has a right to the continuation of that relationship. Only Gerald and Carole have insisted that Gerald's paternal status is exclusive, and thus cast the issue in the context of a competition. Moreover, Gerald's relationship with Victoria is not threatened. At the periods in Victoria's life when it was threatened, Gerald took no steps to preserve it.

Statutes attempt to protect a child's welfare and best interests with a global, rather than a particularized focus. Thus Apppellee accurately asserts that the "best interests" standard is not generally applied to paternity determinations (A.B. p. 13). However, Evidence Code Section 621, despite Califiornia's abolition of the status of illegitimacy through enactment of the Uniform Parentage Act, denies legal protection to some child-parent relationships and classifies certain children and parents on the basis of parental marital status. Determination of the constitutionality of such a classification requires consideration of the child's best interests. It is the Court, itself, not Appellants, which has introduced the concept of "best interests" into the equation.

> "*Quilloin* v. *Walcott* (1978) [held] that the equal protection principle did not require that the law treat married and unmarried fathers alike in all situations. Unmarried fathers do have substantive rights to the care and company of their non-marital children, *but those rights can be overriden when the child's best interests are at stake*. The Georgia law at issue in the case required the consent of both parents before a child born in wedlock could be adopted, but where the child was born out-of-wedlock, only the mother's consent was necessary, unless the father had ligitimated his child. No question of fitness or unfitness was raised by the Georgia law; it quite simply treated married and unmarried fathers differently. The Court held that where there was a judicial finding that the child would be best served by allowing it to be adopted, a natural father's objections could be overridden without infringing on his parental rights.

E. Rubin, "Legitimacy and Illegitimacy" *The Supreme Court and the Family (Supra.)* at p. 41.

To the extent that California, and Appellee seek to support the constitutionality of the statute by asserting

that application of the "balancing test" by California's Supreme Court has rendered it a rebuttable presumption, they must recognize that the child's best interests must be weighed as part of that balance. Thus the constitutionality of the statute must be considered, *inter alia*, in the context of what impact it has on the child.

This Court has distinguished between the rights of unmarried fathers who have a substantial relationship with their children *Caban* v. *Mohammed*, 441 U.S. 391, 99 S.Ct. 1760 (1979); *Lehr* v. *Robertson*, 463 U.S. 254, 103 S.Ct. 2985 (1983) and those for whom the tie is purely biological.[6] By doing so, it recognizes that the child's best interests play a meaningful role in the determination of whether a particular statutory scheme may be constitutionally applied to a particular family relationship.

Gerald purports to distinguish the substantive due process cases protecting the relationships between unwed

[6] This analysis ignores a practical reality. Absent a good relationship with the mother, a putative father may not even learn of the child's conception and birth. Under Evidence Code Section 621 her cooperation is a condition precedent to an opportunity to establish a meaningful relationship with the child. While it may be appropriate to require some efforts to do so, an actual relationship may not be essential if a father acts promptly to assume parental responsibilities and enforce parental rights. Even that requirement may work an economic discrimination as litigation of such issues practically requires sufficient funds to retain counsel, or sufficient education for self-representation. Here, until the Court circumvented the Evidence Code Section 621 issue and ordered pendente lite visitation under Civil Code Section 4601, Michael's opportunities to form and maintain his relationship with Victoria were subject to Carole's cooperation. Similarly, Gerald only enjoyed a relationship with Victoria when Carole chose to reside with or visit him. Despite a better statutory claim to visitation rights, Gerald did not seek them during his separations from Carole and Victoria.

fathers and their children as arising from "the implicit assumption in those cases, that a "family" consists of mother, biological father, and child. . ." (A.B. at 16). They are forced to read between the lines and rely upon "implicit assumptions" because there is no basis in Supreme Court precedent for distinguishing the rights of Michael H. and Victoria to a continued relationship with one another from the rights according to fathers and children in *Stanley*, *Quillon*, and *Lehr*.

Appellee argues that "the question of a child's welfare lies beyond the question of paternity." (A.B. 17) Were that true, the state would have no interest in ascertaining paternity and all paternity legislation would lack a rational basis. Society is appropriately concerned with allocating parental rights and responsibilities so as to protect children, and so as to ensure that, to the extent feasible, the responsibilities of economic support and child-rearing are borne by individual families rather than society as a whole. While a child's welfare is not the sole determinant of her paternity (if it were paternity trials would become "father of the year" contests) neither is the issue of the child's welfare meaningless in the context of paternity. All of the rationales given in support of paternity legislation, including those advanced by Appellee, and by California appellate courts[7] focus on the child's welfare. Thus the parent and child relationship is established to ensure the child economic support, inheritance rights, and continued parental care, love and supervision. The child's welfare was given as the rationale for applica-

[7] See *Estate of Cornelious*, 35 Cal.3d 461, 198 Cal.Rptr. 543 (1984); *In re Lisa R.*, 13 Cal.Rptr. 636, 119 Cal.Rptr. 475 (1975); *Michelle W.* v. *Ronald W.*, 39 Cal.3d 354, 216 Cal.Rptr. 748 (1986); and the appellate court decision in the instant case.

tion of Evidence Code Section 621 in *Marriage of Stephen B. and Sharyne B.*, 124 Cal.App.3d 524, 530-51, 177 Cal.Rptr. 429 (1981) which held that the social relationship of parent and child outweighed, "to the child at least," the biological relationship. Evidence Code Section 621's application was found to be salutary by the California Court of Appeal here because it purportedly protected Victoria "against the social stigma of being branded a child of an adulterous relationship." (Jur.St. B18).[8]

It is true that parental rights and responsibilities cannot be determined *solely* on the basis of a child's best interests. Yet it is also true that any scheme allocating such rights and responsibility must be substantially related to an important governmental objective. *Clark* v. *Jeter*, 88 Daily Journal D.A.R. 7163, No. 87-5565 (1988). Appellee contends that the improtant governmental objective is the protection of marital relationships. His analysis stops too soon. Neither appellee nor California courts have been able to articulate why marital family relationships should be entitled to greater protection than biological, psychological or social family relationships. Protection of the marital relationship is based upon the assumption that it is the optimal setting for childrearing and ensuring paternal financial responsibility. Appellee alleges that if Victoria is permitted to continue her relationship with Michael H., his marital relationship with

[8] That rationale has been explicitly rejected by the California Supreme Court. *Michelle W., supra.* 39 Cal.3d at p. 362, fn. 5). Moreover, the record demonstrates the substantial benefits Victoria received from her relationship with Michael H., and the detriment she would suffer as a result of his exclusion from her life. The record contains no evidence that Victoria ever suffered from the stigma of illegitimacy, or even that such a stigma exists in contemporary American society.

Carole D. is threatened. Yet he fails to demonstrate why his marriage is threatened by recognition of Michael H. Certainly his marriage was threatened by many separations and by Carole's extramarital affairs. It would be no more threatened if Michael played a role in the rearing of Victoria than are the marriages in the substantial number of stepparent families in which children enjoy the care of more than two parental figures in more than one household. What would be threatened is the fiction (for Carole and Gerald) of marital fidelity. But preservation of such fiction cannot be sufficient in and of itself to justify the substantial loss that Victoria has suffered. The marital family would have been best protected by Carole and Gerald's adherence to its values. Protection of marital relationships, in an era in which adultery is not a crime and no-fault divorce is available, is the responsibility of the partners to the marriage, not the state.

Gerald further argues that no decisions hold that a child's right to establishment or preservation of the parent-child relationship is constitutionally protected. In the very recent case of *Roe* v. *Superior Court*, 88 Daily Journal D.A.R. 8049, 8050 filed June 17, 1988 (and therefore not yet final), the California Court of Appeal held that the interests of the mother and child "in establishing biological parentage outweigh the interests of the state in enforcing the conclusive presumption. It thus would be a denial of due process to preclude this action on the ground of the conclusive presumption." California itself, has recognized that children's interests may be sufficiently strong to outweigh the state interest.

Gerald argues that no standard for identifying the child's interest can be established because the child cannot articulate her own interests and such issues must be litigated on behalf of children by their guardians ad litem.

(A.B. 20)[9] Again evading careful analysis through semantic gamesmanship, appellee frames the question as "whether the Constitution requires that the state entrust such decisions as choosing a child's father to an attorney appointed for the child who might act as Victoria's guardian ad litem did in this case." Of course the trial court, not the guardian ad litem, is responsible for the determination of cases. The guardian ad litem of a young child must use his or her best efforts to identify the interests of a young child and articulate them for the court.[10] The adult

[9] This section of Gerald's brief then focuses on his complaints about the choices made by Victoria's guardian ad litem. He notes that the guardian ad litem has never met Victoria while failing to report that he and Carole failed to produce Victoria, once she had reached a sufficient age to confer with counsel, despite several court orders requiring that she be made available to her guardian in the offices of the Conciliation Court and in the offices of one of the court-appointed psychologists.

Gerald is also highly critical of the guardian's reliance upon the findings of the court-appointed psychologist (who he mistakenly identifies as a psychologist). Yet the use of mental health experts remains the most valuable way in which judges can obtain information about family relationships and their impact on children.

He also criticizes the guardian for her reliance upon the psychological evaluation in 1987, but fails to note that the Court rejected her request for a review evaluation. (Jurisdictional Statement Supplemental Appendix A-92) In making that determination the trial judge did not first meet and confer with Victoria, yet Gerald does not argue that the trial court was ill-equipped to determine Victoria's best interests.

[10] The guardian has a concomitant duty to protect the child, to the extent possible, from the stress and iatrogenic effects of the litigation process. Here the guardian recognized that interviews of the child by counsel would be less effective than assessment of the child and her family relationships by mental health professionals. Moreover, to the extent that various persons questioned Victoria about those relationships, the interview process itself might be unduly suggestive

parties are free to present their own positions as to what outcome would best serve the child, and the trier of fact adjudicates the matter. Here the trial court found, in granting pendente lite visitation, that preservation of the relationship between Victoria and Michael was in Victoria's best interests. (A-35-40) In granting summary judgment, the trial court did not act upon the basis of new evidence which led to the conclusion that preservation of the relationship would no longer benefit Victoria. Rather the trial court held that it lacked jurisdiction to preserve the relationship by virtue of the conclusive presumption of paternity.

Appellee identifies the state interests served by Evidence Code Section 621 as

> (1) promoting marriage; (2) maintaining the relationship that has developed between a child and presumed father; (3) protecting and preserving the integrity and privacy of the matrimonial family *Estate of Cornelious*, *Kusior* v. *Silver* (1960) 54 C2d 603, 354 P.2d 657.
> (A.B. 24)

Neither California's appellate courts, nor appellee can articulate how the conclusive presumption of paternity

and thus contaminate the findings of the mental health professionals.

Nor is it in a child's best interests to be directly asked to express a preference for one parental figure over another. Moreover, children frequently base expressions of preference upon unrealistic bases, such as the idealization of an absent parent, or a fear that an emotionally fragile parent would be unduly harmed by the child's expression of his or her true feelings. Consequently, information about a child's relationships with parental figures is best gained indirectly. Stone and Shear, "Boundaries and Limitations in Child Custody Evaluations: A Proposal for Standards," Proceedings of the 25th Annual Meeting of the Association of Family Conciliation Courts (1988).

promotes marriage. Men and women do not enter marriage with the intention that the wife will engage in extramarital affairs secure in the knowledge that the state will render her husband responsible for her progeny. In fact, from the prospective husband's standpoint, such a policy might serve as a deterrent. Nor do the average bride and groom study the arcane provisions of the California Evidence Code before entering into marriage. Law only serves such a policy to the extent that the community is aware of it. Legislators and courts frequently assume a familiarity with law and legal process which does not exist in the lay community. A statute such as this one, designed to maintain a legal fiction, operated largely out of the sight of the general population.

Nor does the statute serve to ensure that married couples will not separate or divorce. Following Victoria's birth, and prior to initiation of this action, Carole and Gerald experimented with a variety of living arrangements. A review of the reported cases under Evidence Code 621 reveals that it is frequently invoked following the divorce of the marital couple. *Marriage of Stephen B. and Sharyne B., supra.; Michelle W.* v. *Ronald W.*, 39 Cal. 3d 354, 216 Cal.Rptr. 748; *Vincent B.* v. *Joan R.*, 226 Cal.App. 2d 313, 179 Cal.Rptr. 9 (1981). As applied in those cases, the statute did not function to preserve marriages.

Maintaining an existing relationship between the child and her mother's husband is a legitimate public policy which the statute may serve in some contexts. Here, Gerald and Victoria, (like the biological father and daughter in *Michelle W., supra.*) is not threatened with the loss of that relationship. Application of the statute is not limited to those cases where the child actually enjoys a relationship with her mother's husband. Nor does the child's

relationship with her mother's husband have any inherently greater value than her relationship with her biological father. Despite Appellee's protestations that the child's welfare is irrelevant to a substantive due process analysis the interests of the parties and the state in sorting through these tangled relationships must be seen in particular rather than general terms.

As noted in Victoria's Brief on the Merits, Evidence Code Section 621 preserves the apparent integrity of marriages, not their actual integrity.[11] The extent of a husband and wife's commitment to monogamy and marital fidelity is within their sole control and discretion. Legislatures have been able to devise methods for pretending that extramarital affairs have not occurred, but they have been unable to prevent their occurrence. Moreover, a system which seeks to deter only the wife's extramarital conduct is, in itself, suspect.

Nor does Evidence Code Section 621 serve the family privacy goals advanced by Gerald (A.B. 24-25). In fact, before Evidence Code Section 621 can be invoked, a party must demonstrate that at the time of conception the married couple were cohabiting and the husband was not sterile. The inquiry into the sexual practices of Gerald and Carole complained of by Gerald took place because of the existence of cohabitation as a preliminary fact which must be established before the presumption operates. Similarly, the inquiry into Gerald and Carole's finances was not intended to explore their economic status, but to determine whether their claim that they had cohabited at the time of Victoria's conception was true. Absent Evi-

---

[11] In fact, a case could be made for the proposition that the absence of such a presumption would encourage marital fidelity.

dence Code Section 621, that inquiry would not have taken place.

Nor does Gerald explain why a mother and her husband have a greater right to privacy about their sexual conduct than do unmarried persons, or a father and his wife. Had Gerald fathered a child outside of his marriage to Carole, he could not have invoked family privacy concerns to insulate him from the ensuing paternity claim.

In discussing Appellants' equal protection claims, Appellee argues

> If we were to accept Appellants' logic, and make Section 621 gender-neutral, since putative fathers cannot be forced to assert their parental rights, Section 621 would have to allow biological mothers to similarly walk away from their parental obligations, leaving a child with no parents!
> (A.B. 31)

State abandonment and neglect laws, and support enforcement laws force the putative fathers of children born to unmarried women to assume parental responsibilities. Similarly, both mothers and fathers may choose to surrender children for adoption, and thereby terminate parental relationships. In *Roe* v. *Superior Court*, *supra.*, application of the conclusive presumption would have left the child fatherless, since the mother's husband had disaffirmed paternity in the marital dissolution proceeding.

RECENT CALIFORNIA AND U.S. DECISIONS

California's most recent appellate review of family relationships arising under Evidence Code 621 illustrates the need for a clearer articulation of the balancing test in this context. California's legislature and Supreme Court have given lower courts no clear criteria by which the state's interests may be balanced against those of the individual

family members. Nor have they demonstrated a nexus between application of the presumption and actual preservation of the marital relationship. Thus California families find their families assessed on a case by case basis, by criteria which lead to great uncertainty as to which parent-child relationships will be given legal status.

In *Roe* v. *Superior Court*, *supra.* a putative father sought application of the conclusive presumption to shield him from paternal responsibilities, most particularly, support.[12] The child had been born during the marriage, but husband and wife separated nine months thereafter. Blood tests eliminated husband as a possible biological parent, and the parties stipulated in the dissolution proceeding that he was not the father. Following the separation of husband and wife, mother and chiid resided with putative father at various times after husband and wife's separation, including one period lasting seventeen months. After the mother and putative father separated, the putative father contributed support for eleven months. Thus child's family experience consisted of nine months with her mother's husband, and various periods in which she resided either with her mother or her mother and putative father. During her first four years of life, she had already experienced a variety of family forms. California's First Appellate District found that application of the presumption would deprive the child and the mother of due process of law. The court identified the state's

---

[12] While both "fathers" in Victoria's life seek to preserve their psychological parent-child relationship and have willingly assumed financial responsibility for her, the child in *Roe* was less fortunate. Neither her presumed father, nor her biological father felt a sufficient commitment to her to continue the psychological parent-child relationship or assume long-term financial responsibility following the end of their relationships with her mother.

interests as protection of family integrity and protection of the child's welfare.

However, Evidence Code Section 621 only comes into play when the partners to a marriage, through their conduct, have created a breach in the integrity of the marital family which has led to the creation of other family relationships. While the fact of marriage initially bespeaks a commitment to continued family life, such commitment cannot be assumed with respect to those families in which Evidence Code Section 621 issues arise. Protection of the apparent integrity of the marital family can only be achieved by the sacrifice of the other relationships which have come into being as a result of the choices of the parties to the marriage. The state has no more compelling interest in the protection of one particular type of familial relationship than another.

Nor does application of the statute result in the actual preservation of marriages. As can be seen from cases like *Roe*, the adult parties to these relationships make their decisions to couple and uncouple[13] without reference to the provisions of the California Evidence Code.

Nor can the balance properly turn on the status of the family relationships as they exist at the moment of the litigation. To do so assumes that family relationships will remain static. But we know, both from the demographic data previously cited, as well as from the facts of those cases which reach appellate courts, that family structures are cast in sand, which can not be legislatively transmuted to stone out of a desire to create idealized families. A court

[13] This terminology is used by Diane Vaughn, in her study of how people make transitions out of marital and nonmarital relationships. Vaughn, Diane *Uncoupling: How Relationships Come Apart* (1986)

which characterizes a biological and psychological father as a nonparent in order to preserve the illusion that the partners to the marriage remained faithful ultimately is gambling about the stability of the already foundering marriage. Absent a prohibition of divorce or separation, such a policy ignores reality.

Nor can the constitutionality of paternity statutes be determined on the basis of whether the initiator of the action sought to establish paternity in the context of protecting a psycho-social father and child relationship, to collect child support, or to determine inheritance rights. Once established, the parent and child relationship brings with it an entire range of legal, psychological, social, economic, and ethical consequences for the parties. Paternity cannot be re-litigated at another juncture, when a different aspect of the parent-child relationship concerns the parties. Whatever due process and equal protection criteria apply must consider all the dimensions of the parent-child relationship.

In *Clark* v. *Jeter, supra.*, this Court has again held that discriminatory classifications based upon sex or illegitimacy must be substantially related to an important governmental objective. In her Brief on the Merits, Victoria has previously noted that Evidence Code Section 621 was initially enacted in the absence of reliable scientific evidence of paternity. That objective has been obviated by "increasingly sophisticated tests for genetic markers [which] permit the exclusion of over 99% of those who might be accused of [or seek to establish] paternity, regardless of the age of the child." *Clark* at 88 Daily Journal D.A.R. 7166. California's courts then termed the presumption a substantive rule of law, and its legislature created a statute of limitations under which some but not all members of the family are granted a limited period of

time in which to introduce blood test evidence. California determines the paternity of most of its children based upon biological ties. Operation of the conclusive presumption, after the child has established a psychological relationship with her natural father cannot be justified. Experience, including the frequent application of the statute to ensure that ex-husbands continue economic support, demonstrates that husbands are not inherently more committed to parental responsibilities than natural fathers. Thus Evidence Code Section 621 cannot constitutionally be employed to efface an established psychological relationship between a child and her biological father.

Respectfully Submitted,

LESLIE ELLEN SHEAR
SHEAR AND KUSHNER
15915 Ventura Boulevard
Penthouse Suite Four
Encino, CA 91436
(818) 501-3691

Attorney and Guardian ad Litem for Appellant Victoria D., A Minor.